COPY

IN THE

Supreme Court of the United States

October Term, 1949

No. 205

CECIL CONTORIL,

Petitioner,

vs.

HONORABLE RICHARD R. HANNA, Judge of the First Judicial District Court of Nevada, in and for the County of Storey; CECIL J. MORRISON, Sheriff of Storey County; URSULA MACHENRY, County Clerk of Storey County; ROBERT H. MOORE, District Attorney of Storey County,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA.

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IN THE

Supreme Court of the United States

October Term, 1960

No. .....

JOSEPH CONFORTE,

Petitioner,

vs.

THE HONORABLE RICHARD R. HANNA, Judge of the First Judicial District Court of Nevada, in and for the County of Storey; CECIL J. MORRISON, Sheriff of Storey County; URSULA MACHENRY, County Clerk of Storey County; ROBERT H. MOORE, District Attorney of Storey County.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA.

Petitioner, Joseph Conforte, respectfully prays that a Writ of Certiorari issue to the Supreme Court of the State of Nevada in order to review its judgment dismissing, on the merits, a petition for writ of certiorari to review a judgment of the First Judicial District Court of Nevada adjudging petitioner in contempt of court.

OPINIONS BELOW.

The trial court rendered no written opinion. Its order adjudging petitioner in contempt is at R. 49-54.

The opinion of the court below [R. 80] is not yet officially reported; it appears in 351 P. 2d 612. It is appended hereto as Appendix "A."

The judgment of the court below [R. 90] is appended hereto as Appendix "B."

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The date of the judgment sought to be reviewed and the time of its entry is April 28, 1960 [R. 90].

2. No petition for rehearing was filed and no application for extension of time within which to petition for certiorari was sought in this Court.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 1257(3), 2101(c) and (d) and Rule 22(1) of this Court.

Execution of the judgment has been stayed pending the determination of this petition for writ of certiorari (Order of Mr. Justice Douglas dated June 24, 1960).

QUESTION PRESENTED FOR REVIEW.

Was petitioner denied due process of law and deprived of the presumption of innocence under the Fourteenth Amendment to the United States Constitution when he was adjudged guilty of contempt of court for violation of an injunction issued in a default proceeding where he was not served with summons or complaint in the injunction action and where the evidence on the question of service was equivocal, the deputy sheriff who purported to serve the process, testifying that he was not sure whether he served the petitioner or some one else, the only other evidence in the case being to the positive effect that petitioner was not served?

CONSTITUTIONAL PROVISION INVOLVED.

United States Constitution, Fourteenth Amendment, Section 1, provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

STATEMENT OF THE CASE.

Facts.

On January 18, 1957, the First Judicial Court of Nevada in and for Storey County, in a default proceeding [R. 87], issued an injunction [R. 52] in the case of Storey County, plaintiff v. Joseph Conforte, aka Joe Conte, defendant, No. 17473 [R. 49], restraining the defendant therein from in any manner maintaining or using certain premises as and for a house of prostitution or for other immoral purposes [R. 52].

On February 3, 1960, the same court in the same case [R. 49] issued as to the defendant therein an order requiring him to appear before the court and show cause why he should not be adjudged guilty of contempt for violating the injunction [R. 50].

Prior to the return date of the order to show cause petitioner filed a Special Appearance and Motion to Dismiss [R. 21] on the ground that he had not been served with process in the injunction proceeding, had made no waiver thereof or voluntarily appeared [R. 22] and that, therefore, under the guaranty of due process, the court had no jurisdiction to proceed (*ibid*).

In support of this motion and special appearance, petitioner filed three affidavits. His own affidavit [R. 26-27] was to the unequivocal effect that he was not

served. The affidavit of Salley E. Burgess [R. 28] was to the effect that she was on the premises at which service was supposed to have been made at all times on the day or days upon which service was purported to have been effected and was likewise to the unequivocal effect that petitioner was not on the premises at any time on said day and that he was not served.

The third affidavit [R. 30-31] was that of Robert L. Peek, the deputy sheriff, who had signed an affidavit form and turned it over to the Sheriff on November 27, 1956 [R. 69], which form recited that he had served a copy of the Summons and Complaint on "Joseph Conforte, also known as Joe Conte" on November 26, 1956 [R. 34, 70]. That affidavit stated, *inter alia* [R. 30]:

> "Since said 16th[1] and 26th days of November, 1956, I have become acquainted with Joseph Conforte, also known as Joe Conforte, and I am not certain whether I made said service on the person I know now to be Joseph Conforte, also known as Joe Conforte, or upon some other person who was then in the premises affected by this litigation."

The County filed no countervailing affidavits or response.

Oral testimony of Mr. Peek was also taken and was to the same effect as his affidavit [R. 72-74]:

> "Q. In November of 1956 or about that time when you served the papers on the person you

[1]The November 16 date is of no significance for the purpose of this case. It is apparently the date on which Mr. Peek received for service a copy of the Temporary Restraining Order and Order to Show Cause (R. 32). The date of purported service was November 26, 1956 (ibid).

then thought to be Joseph Conforte, you made the affidavit or affidavits in good faith; is that true? A. I did.

Q. Were you advised at that time that the person you were serving was Joseph Conforte? A. No, nobody advised me. I went out to this house at the Triangle Ranch and a man come [sic] to the door and I asked if he was Joseph Conforte and he said, 'Yes' and I hand [sic] him the paper and I walked away.

Q. Very well. Now you have made an affidavit stating that 'I am not certain whether I made said service on the person I know now to be Joseph Conforte or upon some other person who was then on the premise.' Is that your statement now? A. Yes.

Q. And that is a mere opinion; is that correct? A. Yes.

Q. Can you swear at this time that the person you served in 1956 definitely was or was not Joe Conforte? Before you answer that question I want to be completely honest with you. Having been a Deputy Sheriff I assume that you realize that you were under oath at this time; that at the time you made these affidavits you swore to them and that there is an offense known as perjury in this state which is a felony. A. Well, I couldn't definitely swear that he was the man.

Q. You are just not sure? A. Yes, or no, I couldn't say one way or the other. That's four years ago and I handed this man the paper who he said was Joe Conforte. After these years I wouldn't know whether Joe Conforte was this man or the man that is sitting over there at the table.

Q. Very well. Now do you care to make to the Court any explanation or give us any reason why at this time, you made and filed the affidavit which you did, the affidavit dated in February of 1960? A. Well, I have known Joe Conforte since then and he asked me to sign it. I couldn't see nothing wrong with signing that. It says I wasn't sure that I served him and I am not sure. I just give [sic] him the paper today. I am not sure whether it was this man or some other man and I couldn't swear to it one way or the other.

"Court: Do counsel care to question the witness further?

Mr. Moore: I have no questions, your Honor.

Mr. Rice: In view of the representations I made to the Court I think I should ask him a question, your Honor, as to what he said to me. I think with your permission I should ask him a question.

Court: Very well. You may.

Mr. Rice: Q. Do you recall having a conversation in my office with me? A. Yes.

Q. That was a brief conversation, the only time I ever met you; isn't that true? A. That's right.

Q. And you didn't see me before or after that time, did you? A. No.

Q. At that time didn't you tell me that you didn't know Joe Conforte when you made the service in November of 1956? A. That's right.

Q. That you now know him; that you know now that the man you then served was not Conforte? A. Well, I didn't know definitely whether I knew him.

Q. Isn't that what you told me? A. I couldn't swear that he was the man or I couldn't swear he wasn't the man.

Mr. Rice: That's all.

Mr. Moore: I have no questions."

As seen, the county asked no questions and presented no countervailing evidence.

The trial court denied the motion to dismiss [R. 74-75].

Thereupon, in order that he not be deemed to have made a general appearance and therefore waived his constitutional objections and the failure of service (*cf. State v. District Court*, 48 Nev. 198, 228 Pac. 617; *Seman v. Pittsburgh Brewing Co.*, 25 FRD 209, 210 [ND Ohio, 1960]) petitioner did not participate in the contempt proceedings [R. 76, 90].

The court adjudged petitioner in contempt [R. 53] and sentenced him to a $500.00 fine, to imprisonment for 25 days and ordered that the premises be destroyed at the cost of petitioner [R. 53-54].

As stated, the court below denied relief [R. 90].

How the Federal Question Was Raised and the Rulings Thereon.

In the trial court petitioner raised the due process point at the first opportunity by his Special Appearance and Motion to Dismiss [R. 21] based on that ground: "the constitutional guaranty of due process renders mandatory to the exercise of jurisdiction, unless there has been a waiver or voluntary appearance, issuance and service of process on the defendant" [R. 22]. The trial court denied the motion [R. 74-75; 51].

In the court below, petitioner raised the same point by petition for writ of certiorari [R. 2] supported by legal memoranda in the same terms as in the trial court [R. 10]. The court below held that the trial court's determination that the evidence did not overcome the presumption of validity [R. 89] would not be disturbed; hence the trial court had jurisdiction and the petition was dismissed (*ibid.*).[2]

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

Certiorari should be granted because of the importance of the question—a recurring one—as to whether or not due process is satisfied where the officer who purported to serve process is uncertain—on test—as to whether he did, indeed, serve the process on the person his return says he did.

In 1874, in *Knowles v. The Logansport Gas-Light and Coke Company*, 19 Wall. (U. S.) 58, this court ruled that a sheriff's return of summons was not conclusive and that evidence showing that it did not speak the truth should have been permitted.

The case at bar now presents the question as to whether, where, at worst, it is not clear whether service was made, and, at best, that service was not made, due process will permit a judgment so obtained to stand. Or, more properly, whether a contempt judg-

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[2]The court below's statement (R. 87) that the maker of the Burgess affidavit was "apparently one of the girls on said premises", is not supported by the record. Nor is there basis in law for the implication drawn by the court (R. 89) that "this court cannot say that Judge Hanna acted improperly in failing to give credence to . . . the affidavit of a woman frequenting such type of premises."

ment of incarceration, fine and destruction of property which resulted from the original judgment based on the disputed notice, violates the due process rights of the citizen so circumstanced.

No extended discussion is needed to substantiate the proposition that notice is an absolute *sine qua non* for procedural due process to be satisfied. And as we understand this court's decision in *Walker v. Hutchinson*, 352 U. S. 112, where it is uncertain that notice has been given, the due process clause is not satisfied.

Here, as we say, even disregarding petitioner's and the Burgess affidavit and based only on Mr. Peek's affidavit and testimony, it is uncertain that notice was given. This does not satisfy due process. The reliance by the courts below on the 1956 return of Mr. Peek does not mitigate against this. The question is not one of conflict of evidence, resolved against petitioner by the courts below. Where, as here, federal constitutional rights are asserted, this court will independently review the factual matter to make sure that such rights have not been denied in substance and effect, even though, expressly, it appears otherwise (*Oyama v. California*, 332 U. S. 633, 636; *Norris v. Alabama*, 294 U. S. 587, 590; *Chambers v. Florida*, 309 U. S. 227, 229; *Patton v. Mississippi*, 332 U. S. 463, 466.)

The precise question at bar has apparently not been determined by this Court, but it has received state court attention and conclusion reached contra to the court below. Typical are the Maryland decisions. In one of them, *Harvey v. Slacum*, 181 Md. 206, 29 A. 2d 276, 278, the court said:

> ". . . It is an elementary principle that no valid proceeding can be had against a person until he

has been notified of the proceeding by proper summons, unless he voluntarily waives such constitutional right. In this case Deputy Sheriff William G. Bayer made the following return of the writ of summons: 'Summoned Ambo and a Copy of Narr and Notice to plead left with each Defendant.' The rule is well established that the official return of service of process is *prima facie* evidence of its truth, and the burden of proof is on the defendant assailing the return to show by clear and satisfactory evidence that he was not fully summoned.

* * * * * * * *

"According to the record in this case, the Deputy Sheriff was not certain whether he had notified William J. Slacum or his son, Clyde Slacum. He admitted that he did not know 'what kind of a case it was or what was in the papers.' When asked whether the man whom he saw was the man who had just testified on the witness stand, he answered with uncertainty: 'It's hard to recognize * * * I won't say positive.' When asked whether he had summoned Mrs. Slacum, he said: 'I can't remember the lady. I believe the lady opened the door for me, if I am not mistaken, and let me in.' When asked whether he had served a summons upon her, he said: 'Well, I ain't going to say positive.' When asked whether he had served a copy of the declaration upon her, he said: 'I won't say positive.' Finally, he admitted that he did not say anything at all to her about why he had come to the house.

"In view of the emphatic denials of the defendants that they had ever been summoned, and the

unsatisfactory testimony of the Deputy Sheriff, we conclude that the writ of summons should have been quashed. . . ."

Note how close to the case at bar the above facts are.

And in another case, *Plummer v. Rosenthal*, 178 Md. 149, 12 A. 2d 530, 531-532, the court said:

"Since an official return of services of process is presumed to be true, the burden is upon a defendant alleging non-service to show that such service was not in fact made, and the burden is not discharged by a mere denial that process was served.

"But this case is not confined to Rosenthal's mere denial that he was served with process by the constable, inasmuch as the testimony of the latter was of such a nature as to create grave doubt as to whether he had summoned Earl Rosenthal, for he first identified Irvin Rosenthal as the one he had summoned, and when he realized his mistake he next said that he had summoned either Earl or his brother, Irvin. He himself being in doubt as to which of them he had summoned, how was the Chancellor to conclude that he had in fact summoned Earl Rosenthal? This doubt upon the part of the constable was sufficient to overcome the *prima facie* presumption of the truth of the return to the writ, and we are of the opinion that the Chancellor was justified in so holding. . . ."

See also *Little v. Miller*, 220 Md. 309, 153 A. 2d 271, 274.

CONCLUSION.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,

FRED OKRAND,

GORDON W. RICE,

Attorneys for Petitioner.

APPENDIX "A".

Opinion of the Supreme Court of the State of Nevada.

In the Supreme Court of the State of Nevada.

Joseph Conforte, also known as Joe Conte, petitioner, vs. the Honorable Richard R. Hanna, Judge of the First Judicial District Court of Nevada, in and for the County of Storey; Cecil J. Morrison, Sheriff of Storey County; Ursula MacHenry, County Clerk of Storey County; Robert H. Moore, District Attorney of Storey County, Respondents. No. 4303.

Filed April 28, 1960.

Original proceeding in certiorari to review action of respondent court.

Petition for writ of certiorari dismissed.

Gordon W. Rice, of Reno, for Petitioner.

Roger D. Foley, Attorney General, and Robert H. Moore, District Attorney, Storey County, for Respondents.

Per Curiam:

Petition for writ of certiorari to review action of respondent court in adjudging petitioner guilty of contempt for failure to comply with an order to abate a nuisance.

In 1957 the District Court of the First Judicial District in and for the county of Storey entered a judgment permanently enjoining the petitioner herein from operating a house of prostitution, declaring the premises involved a nuisance, and ordering abatement of the same. The affidavit of Robert L. Peck, a deputy sheriff, showed personal service of the summons in said action

and of the temporary restraining order upon petitioner Joseph Conforte in Storey County on November 26, 1950. Petitioner made no appearance in said action and his default therein was entered.

Thereafter upon a showing that the said nuisance had not been abated and that the said petitioner was continuing to use said premises a a house of prostitution, the said district court on February 3, 1950 issued an order directing petitioner to show cause why he should not be punished for contempt in failing to comply with said injunction and the order of abatement.

Conforte and his counsel were present at the time and place specified in said last-mentioned order and by special appearance moved to dismiss the contempt proceedings, supporting his motion by the affidavits of Conforte, one Salley E. Burgess, apparently one of the girls on said premises, and said Robert L. Peek. The Conforte and Burgess affidavits stated that Conforte was not served with summons as shown on the return of summons, the Conforte affidavit saying that at the stated time he was not in Storey County, and the Burgess affidavit saying that Conforte was not on "said premises" on the particular day. The Peek affidavit stated that at the time of service of summons, service was made "on a person then believed by me to be Joseph Conforte or Joe Conforte. Since said 16th and 20th days of November, 1950, I have become acquainted with Joseph Conforte, also known as Joe Conforte, and I am not certain whether I made said service on the person I know now to be Joseph Conforte, also known as Joe Conforte, or upon some other person who was then in the premises affected by this litigation."

At the hearing on said motion to dismiss the order to show cause, with Honorable Richard R. Hanna,

District Judge, presiding, in addition to the record of the case from which said order had issued and the said three affidavits in support of the motion, petitioner called said Peek as a witness. In open court he testified that in November 1950 he made the affidavit of service of summons in good faith; that he had gone to the said premises and asked the man who came to the door if he were Joseph Conforte; that when the man answered affirmatively he handed him the summons; that now, more than three years later, he couldn't say one way or the other whether the person served was Conforte. "After these years I wouldn't know whether Joe Conforte was this man * * *." Based on such evidence, the motion to dismiss was denied.

Thereupon petitioner and his client refused to participate in any further hearing on the order to show cause. The court then proceeded to hear evidence in support of the charges against petitioner and finding them to be true adjudged petitioner guilty of contempt.

A perusal of the record before us discloses that the original judgment enjoining petitioner was based on proper service of summons thereby giving the court jurisdiction to enter said judgment. Evidence to impeach said judgment consisted of affidavits made more than three years later and also the oral testimony of the process server. The nature of this evidence has already been disclosed. The court apparently was skeptical of all such impeaching evidence and in denying the motion to dismiss relied upon the original affidavit of personal service.

Certainly this court cannot say that Judge Hanna acted improperly in failing to give credence to the self-serving affidavit of Conforte, the affidavit of a woman

frequenting such type of premises, and the uncertain affidavit and oral testimony of the process server attempting to relate facts occurring more than three years before, or that Judge Hanna acted improperly in failing to hold that the weight of such evidence was sufficient to overcome the presumption in favor of the validity of the affidavit of service of summons. Chader v. Wilkins, 226 Iowa 417, 284 N. W. 183; Couch v. International Brotherhood of Teamsters, Okl., 302 P. 2d 117; Jones v. Reser, 61 Okl. 46, 160 P. 58.

The judgment being valid on its face, and the respondent court's determination that the evidence offered for the purpose of impeaching said judgment was insufficient to overcome the legal presumption of its validity, we must necessarily hold that the court had jurisdiction to hear and determine the contempt proceedings.

Petition for writ of certiorari dismissed.

McNAMEE, *C. J.*

BADT, *J.*

PIKE, *J.*

APPENDIX "B".

Judgments of the Supreme Court.

Joseph Conforte, also known as Joe Conte, Petitioner, vs. The Honorable Richard R. Hanna, Judge of the First Judicial District Court of Nevada, in and for the County of Storey; Cecil J. Morrison, Sheriff of Storey County; Ursula MacHenry, County Clerk of Storey County; Robert H. Moore, District Attorney of Storey County, Respondents. No. 4303.

Appeal from the .... Judicial District Court.....

Gordon W. Rice, Attorney for Petitioner, Roger D. Foley, Attorney General; Robert H. Moore, District Attorney, Attorneys for Respondents.

ORIGINAL PROCEEDINGS IN CERTIORARI.

This case came on regularly to be heard on the 22nd day of April, 1960, it being a regular day of the April 1960 term of this court, when Gordon W. Rice, Esq., counsel for petitioner, and Robert H. Moore, District Attorney, Storey County, counsel for respondents, were duly heard in oral argument on the order to show cause why a writ of certiorari should not issue.

Now, on this day, all and singular the law and the premises having been seen, heard and duly considered, and the court being fully advised in the law, files with the clerk of this court its opinion in writing by *Per Curiam*, to the effect:

"Petition for writ of certiorari dismissed."

Whereupon, it is now ordered, adjudged and decreed as quoted above.

Judgment entered this 28th day of April, 1960.